mitted by Petitioner in his brief before the Court of Appeals at page 3:

> "By the time of the trial they (Respondent) had regained eight of the eleven retail outlets they had in Santa Rosa on September 2, 1948, (R. 29-34, 60)".

The position of Petitioner is not tenable on this point. Petitioner contends that there was no intent to violate the law on his part and that the conspiracy was a matter of civic pride. We fail to find wherein intent is an essential element. *United States* v. *Columbia Steel Company*, 68 S. Ct. 1107, 334 U. S. 495, 92 L. Ed. 1533; *State* v. *Gurley* (*supra*). Nor is good motives an excuse. *Paramount Famous Lasky Corporation* v. *United States*, 51 S. Ct. 42, 282 U. S. 30, 75 L. Ed. 145, affirming D. C. 34 F. (2) 984; *Thomsen* v. *Gayser*, 37 S. Ct. 353, 243 U. S. 66, 61 L. Ed. 597; *United States* v. *General Motors*, 121 F. (2) 376, Certiorari Denied, 62 S. Ct. 105, 314 U. S. 618, 86 L. Ed. 497, Rehearing Denied, 62 S. Ct. 178, 314 U. S. 710, 86 L. Ed. 566.

The admitted purpose of accepting the offer of monopoly was not one of public spirit on the part of Petitioner. He stated that he needed the monopoly so he could maintain his plant in Santa Rosa. His motive was money and profit for his business (R. 12, 13 & 14). He was not interested in the welfare of the community because he was going to forsake it for another where profits would be better. Thus we think contention of Petitioner fails on this point.

Petitioner criticizes the application of the term "boycott" to the acts of himself and the others. Though his criticism is not well founded, we doubt that it matters by what name it shall bear, for the real question is whether or not such acts amounted to an attempt to monopolize or were in restraint of trade.

In answer to the contention that there was an absence of proof of threat, we point out that

> "The word 'boycott', in itself, has been said to imply a threat, and it has been held that the distribution of circulars, containing a notice to 'boycott' a designated firm is in itself an act of intimidation and imparts that the customers of the firm will be treated in like manner if they continue to patronize it." 15 C. J. S. p. 1019.

PART II

The Court of Appeals Did Not Err in Finding Petitioner a Party to the Combination in Restraint of Trade or Individually Attempting to Monopolize Trade.

The Petitioner states that he admitted that he knew of the petition to boycott and was willing to accept its benefits and met with the business men who proposed to circulate it, but that he did not suggest it and took no part in securing signatures (Petition p. 8). This is not all of the Petitioner's testimony. On pages 12, 13 and 14 of the Record he testified that he felt that there was not enough business in Santa Rosa for him and an outside bakery, and after thinking it over, told his landlord in Santa Rosa of his plan to move. The landlord got some of the "fellows" together and they asked the Petitioner what it would take to keep him in Santa Rosa and not move his plant. They asked whether or not he would stay if all of the merchants in town agreed to patronize him alone. After thinking it over two or three days he decided that if all of the merchants wanted him to stay that bad, he would remain if they would support him "100 per cent". He knew about the petition and was willing to accept and take advantage of the benefits therefrom, and that it was done with his consent and for his benefit (R. 45 & 46). He further testified that the only way the people could keep him in

matter which legislative enactment petitioner violated in the application of the doctrines of "clean hands" or "pari delicto". We think not. The illegal act of Petitioner is more closely related to the thing or matter of which he complains than in the *Morton Salt Co.* case and other patent cases cited by the Court of Appeals. (*Morton Salt Co.* v. *Suppiger Co.*, 62 S. Ct. 402, 314 U. S. 488, 86 L. Ed. 363; *Keystone Driller Co.* v. *Excavator Co.*, 54 S. Ct. 146, 290 U. S. 240, 78 L. Ed. 293). Petitioner is not in the position of the illegal dealer in liquor suing to recover an inheritance; or the landlord in an action to collect rents on a building leased by him for an illegal purpose. *Gollehon* v. *Porter*, 161 SW (2) 134.

The Respondent seeks to avoid the consequence of his act by contending (1) that he was under "economic coercion" and therefore should not be held accountable for his acts, (2) that he should not be held accountable because he was no longer a party to the conspiracy to monopolize the bread business in Santa Rosa. We shall discuss each of these points in the order stated.

With reference to economic coercion in which Petitioner seeks to clothe himself, he relies upon *Ring* v. *Spina*, 148 F. (2) 647, wherein it was held that where a party was compelled under economic stress to join with others in an agreement or conspiracy in violation of the Sherman Anti-Trust Act, the party should be held to be a victim rather than a participant in the Anti-Trust violation. But, Petitioner fails to point out the "economic coercion" that was brought to bear upon him to compel him to attempt to monopolize or conspire with his landlord and the "fellows" to monopolize the trade and business in Santa Rosa. He makes no complaint of the Respondent's business practices prior to the date of the boycott. He says that his only offense "was a natural desire to save his floundering business from disaster", (petition p. 8) which we assume means

that, prior to the boycott, his business was not as profitable as he thought it should have been. (A difficulty not uncommon to business as a whole.) Such unfortunate circumstances do not license the Petitioner to violate the Anti-Trust Laws of his State and Nation and injure other people any more than it would license robbery. We had no part in bringing about his difficulty, and, since Petitioner leaves the record to advise this court that he has, since the trial, closed his business, we feel compelled to point out that it appears that Petitioner must have departed a profitable market, for others were eager to and did immediately take his place. Perhaps the "economic coercion" suffered by Petitioner before the boycott was a result of something other than market conditions.

Petitioner contends that he should not be held accountable because he says that he "ceased his improper practice—at the very out-set of the price discrimination complained of". (see petition page 10).

The record in this case is utterly barren of an abandonment or mere utterance of disavowal of the boycott. On the contrary, he confessed parenthood when he testified that he accepted the offer of a monopoly in Santa Rosa and agreed to keep his business there (R. 13). At no point in his testimony does he say he ever asked his co-conspirators to end the boycott. On the contrary he was still accepting the benefits of a boycott that was 27 per cent effective on the very day this cause was tried in the District Court. (See page 3 of Petitioner's brief before the Court of Appeals wherein he admits that at the time of the trial in the District Court three of Respondent's original eleven customers were still boycotting the Respondent.) May it be said now that he had "ceased his improper practice—at the very outset" merely because a few of the conspirators abandoned the illegal combination in favor of an open and free market in their community unhampered by the pitfalls and dan-

gers of a monopoly. He should pursue his action against the deserters, not the Respondent.

His action is nothing more than a mere complaint that his only competitors should not be allowed to compete with him on equal terms. A recovery on such a basis has been denied by this Court in *First National Pictures* v. *Robison*, 72 F. (2) 37 (see p. 40), certiorari denied, 55 S. Ct. 141, 293 U. S. 631, 79 L. Ed. 716.

Petitioner gives added reason to apply the doctrine of *pari delicto* in this case. He admits that his actions were the cause of the price reduction.

> "and when I told him (landlord) about leaving, well, he got up in the air and told some others and none of them wanted me to leave, and that is what started this petition, and that is what started the price cutting." (R. 13).

PART IV

The Dispute Involved Is of a Local Character and Had No Impact Upon Interstate Commerce.

The situation presented by this action is wholly local in character. The parties were direct competitors in 69 retail outlets in Santa Rosa and a number of other towns and communities in the area (R. 69). There were a number of outlets that were Petitioner's customers and never customers of Respondent (R. 38-42). Of the 69 retail outlets in which both parties sold their bakery products, 11 of them were in the Town of Santa Rosa (page 3, Petitioner's Brief before Court of Appeals). The boycott occurred in Santa Rosa only and the prices were reduced only in that town. (R. 43). No price change occurred outside of Santa Rosa (R. 43). Respondent's bread was shipped from its plant in Clovis, New Mexico, to Santa Rosa, New Mexico, and did not pass in interstate commerce (R. 12). As pointed out in the Court of Appeals' opinion the only commerce in-

volved were some sales in Farwell, Texas, which is on the Texas-New Mexico line.

The Robinson-Patman Act (15 U. S. C. A. 13) provides:

> "(a) It shall be unlawful for any person engaged in commerce, *in the course of such commerce*, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, *where either or any of the purchases involved in such discrimination are in commerce*, * * *". (emphasis ours)

It will be noted that under the Sherman Anti-Trust Act it is only required that the combination or attempt to monopolize "affect" interstate commerce and such effect must be direct. *Schechter Poultry Corp.* v. *United States*, 55 S. Ct. 837, 295, U. S. 495, 79 L. Ed. 1570; *Coronado Coal Co.* v. *United Mine Workers*, 45 S. Ct. 551, 268 U. S. 295, 69 L. Ed. 965.

The Robinson-Patman Act requires (1) that the accused be engaged in commerce "either directly on indirectly", and (2) that either or any of the purchasers on such discrimination be in commerce. Something more than just "effect" is required. The purchases involved in the alleged discrimination must be in interstate commerce or be a direct interference with or restraint on such commerce. *Schechter Poultry Corp.* v. *United States* (*Supra*); *Coronado Coal Co.* v. *United Mine Workers* (*Supra*); *Atlantic Co.* v. *Citizens Ice & Cold Storage Co.*, 178 F. (2) 453, Certiorari Denied, 70 S. Ct. 841, 339 U. S. 953; *Lipson* v. *Socony-Vacuum Corp.* (*Supra*); *Abouaf* v. *Spreckels Co.*, 26 F. Supp. 833.

Each and every sale, of which Petitioner complains, was made to eight local retail stores in the town of Santa Rosa, New Mexico. The bread was baked in Clovis, New Mexico, and delivered to Santa Rosa without passing in interstate

commerce and there was sold to the retail stores. "In order for the sales here involved to come under the Clayton Act, as amended by the Robinson-Patman Act, they must have been made in interstate commerce." *Standard Oil Co. v. F.T.C.*, 71 S. Ct. 240. The sales complained of did not and could not have affected interstate commerce. The situation here is purely a local matter and no burden was cast upon such commerce.

PART V

There Must Be a Showing That a Price Discrimination May Substantially Have the Effect of Lessening, Injuring, Destroying or Preventing Competition or Tend to Create a Monopoly.

The Robinson-Patman Act requires that

> "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person * * *;"

The record in this case fails to reveal the slightest evidence of an attempt on the part of Respondent to lessen, injure, destroy or prevent competition or gain a monopoly in any line of commerce, either in instrastate or interstate. The Petitioner himself provided the defense to his accusations when he stated the price cutting resulted from the petition (R. 13). He makes no complaint of the business practices of Respondent prior to the boycott. To establish the effect of the so called discrimination in this case, Petitioner must point to the result of his own unlawful acts.

There must be some showing that the discrimination had the effect substantially to lessen, injure, destroy or prevent competition or tend to create a monopoly. A showing of a

mere price reduction is not enough. *Corn Products Refining Co.* v. *F. T. C.*, 65 S. Ct. 961 at p. 967, 324 U. S. 726 at p. 738; *Lipson* v. *Socony-Vacuum Corp.* 76 F. (2) 213.

Part VI

Action of Respondent Complained of Was In Response to a Changed Condition Affecting the Marketability of Respondent's Bread.

Article 13(a) (U. S. Code Title 15) provides that

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * *, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, * * *: Provided, however * * *: and Provided further * * *: and Provided further, that *nothing contained in Sections 12, 13, 14, 21, 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to* actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned." (emphasis supplied)

The foregoing article first describes what shall constitute an *unlawful* "discrimination", then specifically sets

juring, destroying or preventing competition or tending to create a monopoly, there can be no recovery under the Robinson-Patman Act.

PART VI

The testimony of Petitioner establishes conclusively that the price reduction was made by Respondent in response to an utter destruction of the market for and marketability of its products; therefore, the price reduction was not actionable as a price discrimination under the Robinson-Patman Act.

PART VII

The Petitioner and Brief do not disclose any reason for review of this case by Writ of Certiorari.

PART I

The Court of Appeals Properly Held That Petitioner Violated the Anti-Trust Laws of the State of New Mexico and Declared Policy of the United States.

Petitioner brought this action under the Robinson-Patman Act (15 U.S.C.A. 13a) for treble damages alleging a price discrimination on the part of Respondent. The United States District Court for the State of New Mexico at the close of Petitioner's (plaintiff's) testimony instructed a verdict favorable to Respondent basing its action upon the conclusion that the price reductions complained of were made in response to a changed condition affecting the market for and marketability of Respondent's bread and therefore not actionable under the Robinson-Patman Act (R. 80-90).

The Court of Appeals, without comment upon the conclusion reached by the trial court, found Petitioner in violation of the Anti-Trust Laws of the State of New Mexico

and declared policy of the United States and affirmed the District Court's decision applying the doctrines of "clean hands" and "pari delicto" because of boycott to which Petitioner was a party. We shall not at this point restate the particular testimony establishing the illegal acts of Petitioners. Such testimony appears in Respondent's STATEMENT and restated several times throughout this brief.

The Petitioner takes the position that the boycott was a common undertaking for the benefit of the home town, and that it was merely a campaign to induce citizens to patronize home town merchants and points out that these campaigns sometimes take the form of newspaper advertising and editorials and are frequently sponsored by the Chamber of Commerce. We are inclined to agree with the Petitioner that sometimes such campaigns are carried on, but such is not the case at hand. In this cause Petitioner sought to monopolize and conspired with others to gain a monopoly in Santa Rosa by boycott.

The Petition as well as its application was a violation of the statutes of the State of New Mexico prohibiting monopoly and acts in restraint of trade.

> Article 51-1101 New Mexico Statute (1941) provides that "Every contract or combination between individuals, associations or corporations having for its object or which shall operate to restrict trade or commerce or control the quantity, price or exchange of any article of manufacture or product of the soil or mine is hereby declared to be illegal. * * *".

Article 51-1102 provides:

> "Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this State shall be deemed guilty of a misdemeanor, * * *".

In *State* v. *Gurley* (25 N. M. 233, 180 P. 288) the highest court of the State of New Mexico found great similarity between the Anti-Trust Law of that State and the Anti-Trust Laws of Federal Government.

The article first quoted above finds its genus in the common law, as does Article 1 of Title 15, U. S. C. A., and at least incorporates in the codification common law monopolies and agreements in restraint of trade. The State of New Mexico adopted the common law (Article 19-303, New Mexico Statutes, 1941) in 1876 in the following words:

> "In all of the courts in this state the common law as recognized in the United States of America shall be the rule of practice and decision."

At common law a combination in restraint of trade or monopoly was unlawful because of their restriction upon individual freedom of contract and their injury to the public. *Standard Oil Company of New Jersey* v. *United States*, 31 S. Ct. 502, 221 U. S. 1, 55 L. Ed. 619. To render a combination unlawful at common law it is not necessary that the monopoly be complete. *Addyston Pipe and Steel Company* v. *United States*, 20 S. Ct. 96, at page 106, 175 U. S. 211, 44 L. Ed. 136; *United States* v. *E. C. Knight Company*, 15 S. Ct. 249 at page 255, 156 U. S. 1. Nor was intent essential (*State* v. *Gurley*, 25 N. M. 233, 180 P. 288) and good motives would not save the combination from condemnation at common law, 58 C. J. S., page 971.

While it is true that the courts of New Mexico have construed their statutes but few times the words used by the legislature are not susceptible to serious misunderstanding when applied to Petitioner's acts. The statute says that every contract or combination between individuals "having for its object or which shall operate to restrict trade or commerce" is declared to be illegal. In this case we have an admitted combination and an application of the combination

to drive out and exclude all competition from the City of Santa Rosa. Certainly such a combination and its resulting effect would restrict trade and had for its object and admitted purpose the restriction of the bakery trade in Santa Rose to the exclusive use of Petitioner.

We think that in addition to the violation of the first article quoted, the Petitioner was in violation of Article 51-1102 quoted above.

He entered into an agreement with all the merchants in Santa Rosa, save one, to keep his plant in Santa Rosa, provided all competition be excluded from the market. This was aimed directly at Respondent because it was his only competitor (R. 44). Petitioner's testimony alone establishes an attempt by him to monopolize the bread industry in Santa Rosa. That it was a violation of these acts of the legislature of the State of New Mexico there can be no doubt.

Petitioner contends that the Court of Appeals improperly interprets this court's opinion in *U. S.* v. *Griffith* (68 S. Ct. 941, 334 U. S. 100, 92 L. Ed. 1236) in its citation thereof as authority for their conclusions with reference to the policy of the United States toward monopolies and combinations in restraint of trade. He quotes a portion of the opinion to support his contention that the *use* of the power to monopolize only is unlawful. Such is not the case. In the same paragraph (p. 107, U. S.; p. 945 S. Ct.) the court stated that the power to monopolize may be condemned "even though it remains unexercised." But, in the instant case the power was present by reason of the agreement *and that power was used*, and used successfully. All merchants but one refused to buy Respondent's products (R. 33); and at the time of the trial in this case in the District Court, the power was still being used and was 27 per cent effective on that date. This was ad-

Santa Rosa was to deliver him all of the business, and that he knew that the petition had the effect of running Mead's Fine Bread Company out of town (R. 45 & 46). He admitted attending the meeting held to fix the effective date of the agreed boycott (R. 50 & 51).

A formal contract is not necessary to constitute an illegal combination. If one be required, then the offer on the part of Petitioner's landlord and the "fellows" to deliver him all of the business in Santa Rosa and his acceptance and agreement to remain there would certainly constitute a contract. At least the essential elements of offer, acceptance and consideration are present. However, a formal agreement or contract is not necessary to constitute a combination, either at common law or under the Sherman Act, or under the statutes of the State of New Mexico. A combination has been defined as a design in the minds of two or more persons to accomplish by and through a concerted plan a common purpose. *United States* v. *American Column & Lumber Company*, 263 F. 147, affirmed, 42 S. Ct. 114, 257 U. S. 377, 66 L. Ed. 284, 58 C.J.S., page 975. As pointed out in *United States* v. *Kissel* (31 S. Ct. 124, 218 U. S. 601, 54 L. Ed. 1168), at p. 126, 31 S. Ct.:

> "A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself; * * *."

From a reading of the testimony of the Petitioner alone no conclusion could be reached other than that he was at the minimum a party to the conspiracy, if not the principal and moving factor.

Setting aside the fact of circulating the petition, the Petitioner individually attempted to monopolize the mar-

ket; and by so doing violated the laws of his State and the policy of the United States, including the common law.

Part III

The Court of Appeals Properly Applied Doctrines of "Clean Hands" and "Pari Delicto".

The Honorable Court of Appeals based its judgment upon the sound doctrines of both "clean hands" and "pari delicto". The several cases cited by the court fully supported the view.

The Petitioner apparently is seeking to avoid the doctrines by assuming that his guilt is in no manner connected with his complaint against Respondent. His authorities do not support his position. The unlawful act of which he accuses Respondent is in short an attempt to lessen, destroy or injure competition in the bakery trade in Santa Rosa. Was not the boycott an attempt to lessen, destroy or injure competition in identically the same market and a violation of Article 51-1102 New Mexico Statutes (1941) which makes it unlawful for

> "Every person who shall monopolize or attempt to monopolize any part of the trade or commerce of this State, * * *".

The boycott was further made illegal by Article 51-1101 New Mexico Statutes (1941) which makes unlawful

> "Every contract or combination between individuals, associations, or corporations, having for its object or which shall operate to restrict trade or commerce * * *".

The practices condemned by the New Mexico Statutes are the same as those practices condemned under the Federal Anti-Trust Acts. *State* v. *Gurley* (*supra*). Does it

a period of eight months and twenty-two-days, managed to re-establish its market in eight of the original eleven outlets, at which time it raised the price of bread. (Petitioner's Brief before the Court of Appeals, p. 3). The market for its products was still substantially impaired—the destructive plan was still effective.

The reduction in price was in response to a changed condition affecting the market for and marketability of Respondent's goods. No other conclusion could be reached from the testimony of the Petitioner. Respondent reduced its prices only after its market was destroyed and then only in that part of the market so destroyed.

The fourth proviso was intended to save harmless from the operation of the statute manufacturers, distributors and merchants that find themselves and their goods in a market difficult or impossible to cope with. The market in question changed over night from a thriving market to a market in ruins. Whatever the cause, it had changed—it ceased to exist.

The purpose of the Robinson-Patman amendment was to strengthen the Clayton Act. It was not the purpose of the amendment to paralyze trade by making every price reduction an unlawful discrimination. It wisely included the proviso because it was impossible to forsee everything that could happen to a market.

Respondent submits that it reduced its prices solely for the purpose of staying in a market in which it had the lawful right to enter and remain. On September 2nd it had a thriving market. On September 3rd the market had changed to nothing. This was a changed market condition. Petitioner would complain that Respondent "viciously" cut its price too much and too long. To determine whether this is true or not, we must examine the market. It was a

ruthless market with a death dealing impact upon Respondent. Who could know what would be necessary to cope with tis violence! Time proved that the Respondent's action fell short of success. The market was still 27 per cent closed to it at the time of trial.

Even the Petitioner does not contend that Respondent had any other alternative than to withdraw from the market and find comfort and satisfaction in the single small store that refused to join in the conspiracy and permit Petitioner's scheme to monopolize the market to succeed (R. 46-47).

The Petitioner is asking this Court to close its eyes to his wrong and lay the Respondent upon the courtroom table so that he may extract an alleged damage three-fold. To do this in this case would license local merchants and manufacturers throughout the country to use boycotts, blacklists and other restricting measures against those engaged in and making sales in commerce and daring them to defend themselves. Without the right of self defense by reducing prices the offended party has but the alternative of doing nothing and permitting the conspiracy to succeed; or he may bring an action in court against those with whom he expects to be his customers, accusing them of a violation of the State Anti-Trust Laws, and subjecting them to fines, imprisonment and payment of damages. Following such an action, though successful, it would be difficult to visualize them remaining good customers unchanged by the strife. Business is built on good will and kind feelings between tradesmen, not the results of Anti-Trust suits. The Respondent took the only course open to it. A suit to dissolve the conspiracy would have served no purpose other than to make mortal enemies of Respondent's former customers.

In a very recent case decided by this Court (during the past week) Justice Harold Burton in *Standard Oil Company of Indiana* v. *F.T.C.* (*Supra*) is reported to have stated:

> "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor * * *, the seller may well find it essential, as a matter of business survival, to meet the price rather than lose the customer."

We do not think it material that the Petitioner chose the boycott rather than a price cut to drive Respondent from the market. He had the choice of either, and each of them would have constituted a changed market condition to which Respondent could respond.

It is respectfully submitted that the price reduction complained of was made in response to a changing condition affecting the market for and the marketability of Respondent's goods, and for this reason Petitioner's case is not actionable.

Part VII

The Petition and Brief Fail to Disclose Any Reason for Review By Certiorari.

There has been no showing of a departure from applicable decisions of this Court or a conflict with any decision of another United States Court of Appeals. Nor are the questions presented of a general importance to call for an exercise of this Honorable Court's power of supervision.

Conclusion

The Respondent respectfully submits that the Petitioner has wholly failed to establish grounds for a review of the decision of the Court of Appeals and that his petition for Writ of Certiorari should be denied.

Respectfully submitted,

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